Supreme Court, U.S.
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No. 98-1303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELLEN R. KLEIN,

Petitioner,

v.

DAVID COURTWRIGHT, individually, and DAN SCHAFER, individually, and as past and present chairpersons of the Department of History, Philosophy and Religious Studies of the College of Arts and Science of the University of North Florida,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States District Court for the Middle District of Florida erred in granting summary judgment in favor of Respondents?

2. Whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the district court's award of summary judgment in favor of Respondents?

PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari served on Respondents contains no list of parties to the proceeding and is therefore in derogation of the Rules of this Court. Nevertheless, Respondents state that the parties to this proceeding are as follows:

Petitioner is Ellen R. Klein. Respondents are David Courtwright and Dan Schafer. Petitioner has sued each of these Respondents in both their individual capacities and in their official capacities, as past and present Chairmen of the University of North Florida's Department of History, Philosophy and Religious Studies. To the extent Petitioner's official capacity claims against these Respondents are directed at the University of North Florida, it should be noted that the State of Florida, Board of Regents, not the University of North Florida, is the body corporate.

Adam W. Herbert was named as a defendant, below, while this proceeding was before the United States District Court for the Middle District of Florida. Petitioner, however, did not appeal the district court's dismissal of Adam W. Herbert and Petitioner has not named him as a Respondent in her present Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition in the Courts Below

Petitioner, Ellen R. Klein, Ph.D. (hereinafter "Petitioner"), filed a civil complaint on August 8, 1996, asserting First Amendment-based Section 1983 and All Writs Act claims against Appellees, David Courtwright, Ph.D. (hereinafter "Respondent" or "Courtwright"), and Dan Schafer, Ph.D. (hereinafter "Respondent" or "Schafer"), in their individual capacities and as past and present Chairpersons of the Department of History, Philosophy and Religious Studies (hereinafter "Department") of the College of Arts and Sciences at the University of North Florida (hereinafter "University"). [R1-1-1]. In her complaint, Petitioner alleged that she was denied tenure and promotion to Associate Professor for her "speech" — allegedly protected by the First Amendment — due to: (1) her support of a close friend in the search for an assistant professor position; (2) her alleged "report" of racial discrimination in hiring (as allegedly demonstrated through minutes of a faculty meeting); (3) her posting of multiple copies of a course prefix designation decision by the Florida Department of Education for the course, "Germany Today;" and (4) as a result of her publishing a book titled, *Feminism Under Fire*. [R3-31-3]. On October 7, 1996, Respondents moved to dismiss Petitioner's complaint. [R1-4-1]. In its order on Respondents' motion to dismiss, the district court noted that the All Writs Act was not applicable to the case. [R1-12-1, n.1].

Petitioner subsequently amended her complaint on May 28, 1997 to include Adam Herbert, Ph.D. (hereinafter "Herbert"), former President of the University, suing him only in his official capacity under the All Writs Act, and maintaining her previous claims against Respondents. [R3-31-1,2]. On June 9, 1997, Respondents moved to partially dismiss Petitioner's amended complaint because the court had already decided that the All Writs Act was inapplicable. [R3-34-3]. The district court granted Respondents' motion in an order dated June 26, 1997. [R3-41-1, n.1]. On August 25, 1997, Herbert filed a motion to dismiss Petitioner's amended complaint, arguing that the cause of action against him under the All Writs Act failed to state a claim upon which relief could be granted. [R3-61-1]. Subsequently,

on September 12, 1997, Respondents filed a motion for summary judgment on the basis that no genuine issue of material fact existed concerning: (1) the personal nature of Petitioner's speech; or (2) Respondents' entitlement to qualified immunity from suit. [R3-62-1]. The district court ruled on these motions on October 23, 1997, granting Respondent's motion for summary judgment, as well as Herbert's motion to dismiss. [R4-78-9].

Petitioner filed a notice of appeal of the district court's award of summary judgment on November 18, 1997. [R4-80-1]. Petitioner thereafter filed her initial appellate brief with the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") on March 21, 1998. On appeal, Petitioner asserted that the district court erred in determining that her speech was not a matter of public concern and that the district court furthermore erred in finding that Respondents were entitled to qualified immunity from suit. Petitioner did not appeal the district court's order dismissing Herbert from the case. On May 21, 1998, Respondents filed their answer brief with the Eleventh Circuit. Petitioner then filed a reply brief with the Eleventh Circuit on July 7, 1998. In her reply brief, Petitioner raised the issue that the district court's determination that Respondents, in their individual capacities, were entitled to qualified immunity from suit, did not bar her official capacity claims for prospective equitable relief against Respondents. This issue previously had not been raised by Petitioner either before the district court or in her initial appellate brief.

On December 18, 1998, the Eleventh Circuit, pursuant to Rule 36-1 of its own rules, affirmed the district court's award of summary judgment in favor of Respondents, *per curiam*, without issuing a written opinion. Petitioner now seeks certiorari review from this Court.

B. Statement of the Facts

Petitioner was initially employed by the University of North Florida as an Assistant Professor of Philosophy for academic year 1991-1992. [R2-27-B-3-¶13]. She was re-employed by successive one year contracts until 1997, when she was notified that she was not recommended for either promotion to Associate Professor or for

tenure. [R1-16-R]. Petitioner's last contract with the University was during academic year 1996-1997, and her employment with the University officially ended on May 6, 1997. [R2-27-B-3-¶13; R1-13-1].

Petitioner's employment at the University began on a positive note. For example, in his commentary as Chair of the Department in 1992, Courtwright wrote that, as a teacher, Petitioner had "an outstanding first year . . . ," that Petitioner's scholarship "was very good . . . ," and that her service was "satisfactory. . . ." [R1-16-CC]. In 1993, Courtwright, as Chair, raised a concern with Petitioner's low rate of return of Student Instructional Report forms, or "SIRs." [R1-16-DD-1][1]. Courtwright stated that "[i]t would be a real tragedy if a low response rate cast a shadow of suspicion over her excellence as a teacher, a quality that is undoubtedly real and of great benefit to the institution and its students." [R1-16-DD-1]. Courtwright noted that Petitioner's scholarship was good, as *Feminism Under Fire* was in the works at this time; also, Courtwright explained that Petitioner's service was "very good." [R1-16-DD-1,2].

For academic year 1993-1994, Professor John Maraldo (hereinafter "Maraldo") was the Acting Chair of the Department; thus, he provided the Chair's commentary on Petitioner. [R1-16-EE; R5-70-44]. As Courtwright had done, Maraldo cautioned Petitioner as to her low SIR return rate, and he strongly recommended to Petitioner that she provide more documentation as to her teaching. [R1-16-EE-1; R5-70-44]. Also, even at this early date, Petitioner was beginning to have problems with her departmental service. Accordingly, in his commentary, Maraldo wrote that he could not regard Petitioner's service contribution at the departmental level "as either collegial or cooperative." [R1-16-EE-2].

Since the SIRs are used to evaluate an individual's teaching effectiveness, every faculty member is responsible for creating, over time, a profile of his or her effectiveness in this area. [R2-27-A-Tab 5-18, 19]. An individual seeking either promotion or tenure is

1. SIRs are forms distributed to students to evaluate their professors and are required for all courses taught by non-tenured faculty. [R2-27-A-Tab 5-19,20].

evaluated on the basis of his or her entire term at the University; thus, this teaching profile serves as a means to evaluate an individual's teaching ability. [R2-27-A-Tab 5-26]. Petitioner, however, made it known throughout her time at the University that she did not like this established requirement and, in clear dereliction of the requirement that the SIRs be distributed by non-tenured faculty for every class, Petitioner gave students an option of whether or not to complete the forms. [R2-27-B-6; R4-64-F-Tab 1]. Specifically, Petitioner stated in her annual report for academic year 1994-1995 that:

> I do not have SIR forms available for all courses. This is due to the fact that there is a great deal of controversy surrounding the legitimacy of these forms on campus, therefore, I offer students the choice: SIR and/or attached evaluation.

[R4-64-F-Tab 1-1, n.1].

1. *Petitioner's Support of David Fenner*

Beginning in 1994, Petitioner evinced a personal crusade to have her friend, David Fenner (hereinafter "Fenner"), hired as an Assistant Professor of Philosophy. Fenner was hired for academic year 1992-1993 as a Visiting Assistant Professor. Petitioner claims that she was retaliated against and denied promotion and tenure because of her support of her friend, Fenner, and her circulation of her version of minutes of a November 15, 1994 departmental meeting regarding Fenner. [R3-31-3-¶7]. Petitioner and Fenner both received their Doctor of Philosophy from the University of Miami. [R4-64-E-4-¶5; R2-27-B-9, n.3]. Fenner was also Petitioner's research partner at one time. [R4-64-E-4-¶5]. Petitioner's personal mission to have her close friend hired permeated every aspect of her relationship with the Department.

For example, during 1994, the Department was involved in a search for an Assistant Professor. The Philosophy Search Committee (hereinafter the "Committee") met on March 3, 1994, and each Committee member gave his or her evaluation of the candidates for the position. [R4-64-E-4-¶5, and Tab 1]. During this meeting, Petitioner continually interrupted with her feelings that her close

personal friend, Fenner, should be offered the job. [R4-64-E-Tab 1]. The members had to request numerous times that Petitioner allow them to continue their evaluations without interruption. [R4-64-E-Tab 1]. Following the members' evaluations of the candidates, the committee voted that no candidate be selected at that time and that the search be continued. [R4-64-E-Tab 1- 4]. The Committee voted twice, but Petitioner left the meeting before the second vote. [R4-64-E-Tab 1-4].

Following the March 3, 1994, Committee meeting, Petitioner wrote to the Dean of the College of Arts and Sciences, Lewis Radonovich (hereinafter "Radonovich"), urging that he give Fenner the "chance to prove himself (again) by teaching what the Department claims is so essential with respect to Ancient and Ethics [philosophy courses]. . . ." [R4-64-E-Tab 2-1]. In a later letter to Radonovich concerning Fenner, Petitioner illustrated just how personal this matter was to her:

> As for me, well, I do not really want to be here without Fenner. Although I agree with you that I could earn tenure, I do not see how without Fenner, this would make any real difference.

[R4-64-E-Tab 3].

During the search for an Assistant Professor, Courtwright proposed to employ Fenner as a minority hire in philosophy; thus, he called a special Department meeting on November 15, 1994 for this purpose. [R2-27-B-8-¶22; R5-70-146]. In Courtwright's words, he "was trying to help David Fenner." [R5-70-146]. Courtwright invited Radonovich and Carson C. Cook (hereinafter "Cook"), the University's Director of Equal Opportunity Programs, to attend the meeting so that members of the Department could ask whether hiring Fenner was an appropriate, legal thing to do. [R5-70-138]. According to Cook, it was Courtwright's proposal to offer the job to Fenner. [R2-28-2-¶5]. Schafer was not present at this meeting; in fact, he was out of the country. [R2-27-A-5-¶22; R4-64-F-5-¶9].

The responsibility for taking minutes of Department meetings typically rotated among members of the Department, and this time,

the responsibility fell to Petitioner. [R2-27-B-9; R5-70-110]. As the purpose of this meeting was to ask questions regarding the legality of hiring Fenner, the members of the Department took advantage of this opportunity to explore the matter. [R2-27-B-9; R5-70-138]. Unfortunately, because of Petitioner's personal crusade for Fenner, the minutes she prepared were inaccurate in that they misattributed and mischaracterized several questions or comments made by the individuals present at the meeting. [R2-27-C-3-¶8].

Departmental policy required that the minutes of the meeting be approved by those present at the meeting prior to their being circulated out of the committee. [R2-27-B-9]. However, prior to giving the individuals at the meeting a chance to review the minutes, Petitioner submitted her minutes to her union representative. [R2-27-B-9; R5-70-145]. Individuals within the Department were surprised to learn that their statements during this Department meeting had been mischaracterized in such a fashion and that they were given no opportunity to review the minutes prior to the circulation of those minutes outside of the Department. [R5-70-145].

Because of the inaccuracies in the minutes prepared by Petitioner, the Department had to rewrite accurate minutes, which were subsequently adopted at a January 17, 1995, meeting, where Petitioner herself voted for the revised minutes. [R5-70-146; R5-70-147; R4-64-I-2-¶5; R4-64-J-2-¶5; R4-64-K-2-¶5; R4-64-L-2-¶5; R4-64-M-2-¶5; R4-64-N,-2-¶5; R4-64-O-2-¶5; R4-64-P-2-¶5]. Petitioner's actions disrupted departmental functions in several ways: Petitioner violated policy regarding the circulation of minutes, her colleagues were not given an opportunity to review the minutes prior to their being circulated outside of the Department, and the Department had to redraft and approve accurate minutes. [R2-16-FF-1].

On November 30, 1994, Petitioner approached Courtwright regarding the hiring of Fenner. [R4-64-E-Tab 4]. Because of Courtwright's feeling that Petitioner's behavior was inappropriate, he recorded in a memorandum what transpired:

> Professor Klein . . . said that my proposal to consider hiring Professor Fenner 'wasn't doing enough' to help him,

> that what I really needed to do was act like a philosopher king and, in my capacity as hiring officer to simply select him, thereby ending the "oppression" of the "tyranny of the majority." Democracy, she said, was "inherently evil."

[R4-64-E-Tab 4; R5-70-151]. It appeared to Courtwright that Petitioner, based upon her actions regarding Fenner, "had become obsessed with this search. . . ." [R4-64-E-Tab 4].

2. *"Germany Today."*

Petitioner also claims that she was retaliated against because of her "speech" in connection with a course entitled "Germany Today." [R-3-31-3-¶7]. This course, taught by Associate Professor Andrew Buchwalter, Ph.D. (hereinafter "Buchwalter"), had been offered by the Department as a special topics course. [R4-64-E-8-¶9; R5-70-56]. No review external to the Department is required for special topics courses. [R5-70-71]. These courses do not appear in the course catalog. [R4-64-E-8-¶9]. All courses which start as special topics courses, and which the Department desires to place in the course catalog, must proceed through a multi-level review process to be designated with a permanent course prefix, such as PHI for a philosophy course. [R5-70-67].

The review process for the "Germany Today" course was initiated by Maraldo as Acting Chair during academic year 1993-1994. [R5-70-59; R4-64-E-8-¶9]. At issue was whether to approve the course as bearing a permanent PHI philosophy prefix. [R5-70-59]. However, this decision had no effect on whether the course would be taught or on the credit received by philosophy students toward graduation. Regardless of whether the PHI prefix was approved for the course, students could not take the special topics course, nor the PHI version of the course, for credit toward their major. [R4-64-E-8-¶9].

In August of 1994, the Florida Department of Education responded to the Department, stating that it could not categorize the course in philosophy because it belonged in history or political science. [R4-64-E-Tab 6]. Petitioner received a copy of this decision and posted numerous copies of it on her office door with derogatory comments aimed at Buchwalter and Courtwright on the copies. [R2-

27-B-10-¶23; R4-64-E-9-¶11; R5-70-60]. Courtwright reprimanded Petitioner for this personal attack on her colleagues, and informed Petitioner that he considered her behavior "rude and uncollegial. . . ." [R4-64-E-9-¶11; R2-16-00].

Regarding her criticism of the "Germany Today" course, Petitioner testified that she "opposed the course being taught under the PHI designation. . . ." [R5-75-33]. Petitioner's concern with the PHI designation of the "Germany Today" course was rooted in her personal belief that more "meat and potatoes" philosophy courses should be the focus of the Department's curriculum. [R4-64-E-8-¶10]. In a letter to Radonovich on March 3, 1994, Petitioner wrote:

> As we discussed, too many courses are being neglected for the German history/philosophy and Japanese/ Buddhism courses our specialists enjoy teaching so much.
>
> If you notice I and Fenner (as well as Bob) held down the department these last few years by teaching a lot of basic stuff. . . .

[R4-64-E-Tab 5]. Schafer was not at the University when the State issued its decision, or when Petitioner posted numerous copies of the decision. [R5-71-103].

3. *Feminism Under Fire.*

Petitioner also claims that she was retaliated against because of her book, *Feminism Under Fire*. [R3-31-3-¶6]. In fact, in his 1993 Chair's commentary, Courtwright specifically noted Petitioner's scholarship contributions in her writing of this book. [R1-15-DD-2]. Notably, Petitioner was given favorable credit in the area of scholarship by both Schafer and Courtwright in their promotion and tenure recommendations because of *Feminism Under Fire*. [R1-16-F-1,2; R2-27-B-8-¶21].

4. *Petitioner's Application for Promotion and Tenure.*

The record in this case reflects that numerous problems existed which strongly supported the denial of both promotion and tenure to Petitioner. To achieve promotion to Associate Professor, a candidate must be:

> a) excellent in teaching, excellent in scholarship, and demonstrate continuing meaningful contributions in service; or b) excellent in teaching, excellent in service, and demonstrate continuing competence in scholarship.

[R2-27-A-Tab 5-22]. To achieve tenure, a candidate must:

> demonstrate excellent teaching, continuing competent scholarship, and continuing meaningful service during the course of his or her tenure-earning interval.

[R2-27-A-Tab 5-24]. An individual seeking promotion or tenure is evaluated on the basis of his or her entire term at the University. [R2-27-A-Tab 5-26].

A department chairperson is responsible for making a promotion and tenure recommendation to the dean of his college, in this case, the College of Arts and Sciences. [R2-27-A-Tab 5-31]. In reaching that recommendation, the chairperson gives consideration to the recommendation of his department's promotion and tenure committee, which is composed of approximately a dozen faculty members, each of whom individually reviews the candidate and casts a secret vote. [R2-27-A-Tab 5-31]. The dean, having received from the department chairperson a recommendation on a candidate (irrespective of whether in favor of or against granting tenure), is then responsible for making a recommendation to the University Provost and Vice President of Academic Affairs. [R2-27-A-Tab 5-32]. The University Promotion & Tenure Committee also makes an independent recommendation regarding the candidate. [R2-27-A-Tab 5-32]. The Provost and Vice President of Academic Affairs then undertakes yet another level of independent review before making a recommendation to the President of the University. [R2-27-A-Tab 5-32,33]. The President, exercising one more independent level of review, makes favorable recommendations to the Board of Regents. [R2-27-A-Tab 5-34]. The Board of Regents retains ultimate authority on all tenure decisions. [R2-27-A-Tab 5-34].

During her time at the University, Petitioner actually applied for tenure twice. Petitioner first became eligible for tenure during her fourth year of employment (1994-1995), but she elected to defer her

candidacy for promotion and tenure to the following year. [R2-27-A-3-¶12]. In her fifth year of employment (1995-1996), she submitted her application for promotion and tenure, but then voluntarily withdrew her candidacy prior to her application reaching the final decision-making level. [R2-27-A-3-¶13]. Schafer was the Department Chairperson during Petitioner's second and final candidacy for promotion and tenure during academic year 1996-1997. [R2-27-A-3-¶14].

The following is a chart setting forth the decisions, at the six independent levels of review, on Petitioner's candidacy for promotion and tenure in her last year of eligibility:

Promotion/ Tenure	**Dept. Cmte. Rec.**	**Chair Rec.**	**Dean Rec.**	**U. Committee Rec.**	**Provost Rec.**	**Pres. Rec.**
Tenure	0-yes 9-no	no	no	0-yes 8-no 3-abstain	no	no
Promotion	1-yes 11-no	no	no	0-yes 8-no 2-abstain	no	no

[R2-27-A-3-¶14; R2-27-A-Tab 3; R1-16-L; R1-16-M; R1-16-Q; R1-16-R].

Courtwright participated in the review of Petitioner's application for promotion and tenure as a Department faculty member and as a member of the University Promotion and Tenure Committee. [R2-27-B-5-¶17]. Courtwright voted against both promotion and tenure after considering Petitioner's entire employment history with the University. [R2-27-B-5-¶17,18; R1-16-U]. According to Courtwright, his recommendations against promotion and tenure were based upon many factors, including Petitioner's non-attendance at important departmental and Faculty Association meetings, her failure to meet deadlines for the completion of projects, and her refusal to follow University and departmental policies and procedures, such as the requirement that SIRs be used to evaluate teaching effectiveness.

[R2-27-B-6,7-¶19; R1-16-U]. In his letter recommending against promotion and tenure for Petitioner, Courtwright noted the problems with Petitioner's service to the Department, as well as her problems with demonstrating excellence in her teaching through the SIRs. [R1-16-U]. Courtwright did not vote against Petitioner in the area of scholarship. [R2-27-B-8-¶21].

Schafer voted against a grant of promotion or tenure to Petitioner, and the reasons for his decision included Petitioner's overall serious absenteeism record for departmental meetings, her refusal to follow policies (e.g., completion of SIRs, canceling classes without proper notice), and her refusal to participate in committee functions. [R2-27-A-8-¶30; R2-27-A-Tab 2]. Specifically, Schafer noted in his recommendation against promotion and tenure that Petitioner's excellence in teaching had not been demonstrated, based upon her low rate of return of SIR evaluations.[2] [R2-27-A-Tab 2-1,2]. Schafer also noted that Petitioner failed to meet the minimum standard of continuing meaningful service, and that Petitioner's overall record was that of negative service to the Department. [R2-27-A-Tab 2-2]. Schafer did give Petitioner credit for achieving the required scholarship because of her book, *Feminism Under Fire*. [R2-27-A-Tab.2-3].[3]

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2. Further, Petitioner's sporadic administration of the SIRs confirmed her colleagues' doubts about her unwillingness to follow University procedures, a fact which reflected negatively on Petitioner in the area of service. [R2-27-B-6,7-¶9; R2-27-A-8-¶30].

3. Courtwright and Schafer also direct the Court to the letters submitted by Petitioner's colleagues regarding her candidacy for promotion and tenure. [R1-16-W; R1-16-X; R1-16-Y; R1-16-HH; R1-16-II; R1-16-JJ; R1-16-KK; R1-16-LL].

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE OPINION OF THE UNITED STATES DISTRICT COURT DOES NOT CONFLICT WITH THE FIRST AMENDMENT OR THE ACADEMIC FREEDOMS IT PROTECTS

Although Petitioner has asserted in her Petition for Writ of Certiorari that the district court's opinion, below, is in conflict with the First Amendment to the Constitution of the United States, Respondents were surprised to discover that nowhere in her Petition does Petitioner identify the nature of this conflict. Notwithstanding her eloquent rhetoric about societal gadflies, or her self-aggrandized comparisons to Martin Luther King and Socrates, it would appear that Petitioner's entire argument that the opinion of the district court is contrary to the First Amendment is premised upon the following question which she both poses and answers:

> . . . one must ask why there is now such a conspicuous lack of cases in which employees of [state educational] institutions have been given favorable judgments? I offer the lack of support from th[e United States Supreme] Court as the *prima facie* reason why this writ ought to be taken seriously.

See Petition for Writ of Certiorari at p. 5. Respondents do not share Petitioner's misguided belief that this Court fails to support employees of state educational institutions with respect to First Amendment challenges; however, even assuming for the sake of argument that such support is lacking, this fact is inconsequential. Simply stated, any lack of support by this Court for employees of state educational institutions in free speech cases does not, *a fortiori,* demonstrate the existence of a conflict between the district court's opinion, below, and the First Amendment.

As a party seeking certiorari review, the burden of establishing such a conflict falls squarely on Petitioner's shoulders. A review of this portion of Petitioner's brief, however, reveals that it is wholly devoid of any showing that the district court, below, issued an opinion that is in conflict with the First Amendment. Quite the contrary,

Petitioner, in her brief, focuses her attack on the opinions of this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Perry v. Sinderman*, 408 U.S. 593 (1972) and *Connick v. Myers*, 461 U.S. 138 (1983), as opposed to the opinion of the district court. *Id.*

As this Court has repeatedly observed, the First Amendment does not guarantee absolute freedom of speech. *See e.g., Board of County Commissioners of Waubansee County v. Umbehr*, 518 U.S. 668, 675 (1996); *Connick*, 461 U.S. at 146. To the contrary, the First Amendment's guarantee of freedom of speech is limited and only protects governmental employees from adverse personnel action when their speech addresses matters of public concern. *Id.* While Petitioner may not agree with the manner in which this Court has determined the applicability of the First Amendment's protections with respect to the exercise of free speech by faculty employed by public educational institutions, this fact alone, is no basis for granting her request for certiorari review. Because Petitioner has wholly failed to provide any showing that the district court's award of summary judgment is in conflict with either the letter or spirit of the First Amendment, her argument in this regard establishes no valid or viable basis for certiorari review by this Court.

II. THE PETITION SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ACTED IN ACCORDANCE WITH ITS OWN RULES AND BECAUSE ITS AFFIRMANCE OF THE DISTRICT COURT'S RULING IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS AND DOES NOT CONFLICT WITH DECISIONS OF THE SECOND AND EIGHTH CIRCUITS

In her second argument in support of why her Petition should be granted, Petitioner challenges the propriety of Eleventh Circuit's *per curiam* affirmance of the district court's award of summary judgment in favor of Respondents without rendering a written opinion. In the heading to this particular argument in her brief, Petitioner references Rule 36-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit and then argues:

> The judgment of the district court was based on a finding of fact that was not clearly erroneous, unless the presumption was made that nothing the appellant said was true.
>
> * * *
>
> Summary Judgment was not supported by the record because the court should not give summary judgment "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief."

See Petition for Writ of Certiorari at p. 6 (citations omitted). Although Petitioner's skeletal arguments are somewhat confusing, it would appear that based upon the foregoing passages, Petitioner believes that the issuance of a *per curiam* affirmance without a written opinion in the appeal below was improper, because either: (1) the district court's findings of fact were clearly erroneous; or (2) the district court could not support its award of summary judgment based upon the record below. Respondents assert that either argument is without merit.

Clearly, the Eleventh Circuit acted appropriately in affirming the district court's award for summary judgment without rendering a written opinion. The Eleventh Circuit's authority to issue *per curiam* decisions without accompanying written opinions is set forth in Eleventh Circuit Rule 36-1, which provides:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial competent evidence on the record as a whole;

> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

See 11th Cir. R. 36-1. While the Eleventh Circuit's *per curiam* affirmance does not specify which of the grounds set forth in Rule 36-1 it relied on, given the fact that awards of summary judgment are subject to a *de novo* (as opposed to a clearly erroneous) standard of review, it is obvious that the Eleventh Circuit relied on Rule 36-1(d). *See e.g., Adams v. Poag*, 61 F.3d 1537, 1542 (11th Cir. 1995); and *Cox v. U.S. Steel*, 17 F.3d 1386,1395-1396 (11th Cir. 1994).

In attacking the applicability of Rule 36-1(d), Petitioner makes the conclusory and circular assertion that

> [s]ummary judgment was not supported by the record because the court should not give summary judgment "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief [(citations omitted)]."

See Petition for Writ of Certiorari at p. 6. Respondents do not quibble with Petitioner about the proper standard for an award of summary judgment. Rather, Respondents point out that the district court, in applying this standard to the existing record evidence below, specifically determined that summary judgment in favor of Respondents was warranted because: "[e]ven accepting [Petitioner's] claims as true and deciding that [Petitioner] was treated unfairly would not give [Petitioner] redress in [that] [c]ourt." *See* Appendix A to Petition for Writ of Certiorari at p 10a. Because Petitioner's brief is utterly devoid of any showing that the district court's award of summary judgment was not supported by the record below, her assertion that the Eleventh Circuit's *per curiam* affirmance of the district court's award of summary judgment was in error, is without merit and doomed to fail.

Undaunted by the sheer mountain of record evidence relied upon by the district court in awarding summary judgment, Petitioner argues that the Eleventh Circuit's *per curiam* affirmance of such an award is in conflict with the opinions rendered by the Second and Eighth Circuits. However, a comparison of the district court's opinion with similar opinions issued by the Second and Eighth Circuits demonstrates that this is not the case. Based upon the record evidence below, the district court found that Petitioner's speech involved personal grievances and/or matters raised by an employee related to the administration of the University, as opposed to matters of genuine public concern. *See* Appendix A to Petition for Writ of Certiorari at pp. 7a-10a. In reaching this conclusion, the district court correctly observed that when attempting to determine if an employee's speech addresses a matter of public concern:

> Courts "consider whether the speech at issue was made primarily in the employee's role as a citizen, or primarily in the role of employee." *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S. Ct. 2708, 129 L.Ed.2d 836 (1994). The "First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers*, 461 U.S. 138, 149, 103 S. Ct. 1684, 1691, 75 L.Ed.2d 708 (1983) In the Eleventh Circuit, a "public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." Ferrara [v. Mills, 781 F.2d 1508,] 1516 [11th Cir. 1986]. Instead to rise to a level of public concern, statements must be directed "beyond the scope of internal management." *Kurtz v. Vickery*, 855 F.2d 723 (11th Cir. 1988). In the context of an educational setting, "speech that concerns internal administration of the educational system and personal grievances will not receive constitutional protection." *See Maples v. Martin*, 858 F.2d 1546, 1552 (11th Cir. 1988).

See Appendix A to Petition for Writ of Certiorari at p. 7a-8a.

Despite Petitioner's claims to the contrary, a review of First Amendment jurisprudence from the Second and Eighth Circuits reveals that both courts have affirmed judgments for public employers in free speech cases, under similar facts, after determining that the speech in question involved employment-related matters or personal grievances, as opposed to genuine matters of public concern. *See e.g., Lesher v. Reed*, 12 F.3d 148, 1151 (8th Cir. 1994) ("A public employee's personal complaints to his employers, even if they are about a matter of public interest, do not constitute protected speech"); *Bausworth v. Hazelwood School District*, 986 F.2d 1197, 1198 (8th Cir. 1993) (public school bus driver who spoke out in her capacity as a public employee and not in her role as a citizen, when repeating a parent's question to her superior, was not speaking about a matter of public concern); and *White Plains Towing Corporation v. Patterson*, 991 F.2d 1049, 1058 (2d Cir. 1993) ("when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee on matters only of personal interest, absent most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

Finally, Petitioner cites the decision of *Barnhard v. Jackson County*, 43 F.3d 1218 (8th Cir. 1995) for the proposition that "the issue of 'whether the public employee's protected speech played a substantial role in his or her termination is an issue of fact to be resolved by a jury.' " *See* Petition for Writ of Certiorari at p. 7. Petitioner's citation, however, is misleading due to her failure to fully quote from this opinion. A full review of the *Barnhard* decision makes it clear that the issue of whether the employer's decision to discharge is substantially motivated by the employee's speech is only reached if it is first determined that the speech constitutes a matter of public concern. 43 F.3d at 1226. In this respect, rather than being in conflict with the Eleventh Circuit's *per curiam* affirmance of the district court's award of summary judgment, the holding in *Barnhard* is identical to the district court's determination that:

> in order for [Petitioner], a public employee, to establish that her First Amendment rights have been violated by

> her employer, she must first demonstrate that the content of her expression is of a public concern.

See Appendix A to Petition for Writ of Certiorari at p. 4a and n. 1; *citing Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). Notably, this Court has held that the issue of whether speech is a matter of public concern is an issue of law to be decided by the courts. *See Connick*, 461 U.S. at 147. In the present case, since the district court found, as a matter of law, that Petitioner's speech did not involve matters of public concern, there was no need for it to determine if Petitioner's speech played a substantial role in her denial of promotion and/or tenure.

While the Eighth Circuit's opinion in *Barnhard* does state that the question of whether the employee's speech constituted a substantial motivating factor in the employer's discharge decision is "ordinarily" an issue for the jury, the Eighth Circuit nevertheless concluded:

> The discharged employee does not in every case successfully resist a summary judgment motion merely by asserting that certain protected speech caused termination from public employment. At some point, the speech becomes so remote in time to the discharge that a court may rule as a matter of law that even if the speech enjoys First Amendment protection, it played no role in employee's termination.

Id., citing O'Connor v. Chicago Transit Authority, 985 F.2d 1362, 1368 (7th Cir. 1993). Notably, the bulk of Petitioner's alleged exercise of her right to free speech (i.e., the Fenner episode and the "Germany Today" issue) occurred in early-to-mid-1994, several years before her applications for tenure or promotion were denied. Moreover, because both Respondents have denied that their decision not to support Petitioner's applications for tenure and promotion were motivated by any of her alleged First Amendment-protected activities, and since Petitioner has not rebutted their denials, the Eleventh Circuit acted appropriately in affirming the district court's award of summary judgment in favor of Respondents.

III. THE PETITION SHOULD BE DENIED BECAUSE THE OPINION OF THE UNITED STATES DISTRICT COURT IS IN ACCORDANCE WITH RULINGS PREVIOUSLY MADE BY THE ELEVENTH CIRCUIT AND IS NOT INCONSISTENT WITH EITHER PREVIOUS OPINIONS OF THE FIFTH AND TENTH CIRCUITS OR THIS COURT

In this portion of her brief, Petitioner argues that the district court's award of summary judgment is inconsistent with previous rulings of this Court, the Eleventh Circuit, the Fifth Circuit and/or the Tenth Circuit. Once again, however, careful attention to the facts and record evidence below, renders Petitioner's claims baseless.

First, Petitioner asserts that the district court's determination that her book *Feminism Under Fire*, did not amount to a matter of public concern, is contrary to the Eleventh Circuit's ruling in *Maples v. Martin, supra.* Petitioner's contention in this regard is without merit. The district court below stated the following with respect to Petitioner's book:

> . . . the speech found in chapter 7 of Plaintiff's book, "Feminism Under Fire" is not the type of speech protected by the First Amendment because it , too, does not concern a matter of the public. Quite the contrary, this chapter sets out in detail Plaintiff's personal account of her dealings with her Department. As accurately stated by the Defendants, "Plaintiff has used her book . . . as a vehicle to promote her purely private interests and to air her personal grievances."

See Appendix A to Petition for Writ of Certiorari at p. 9a. As evidenced in both Respondents' answer brief and the district court's summary judgment order, chapter 7 of Petitioner's book is literally strewn with commentary showing that the matters discussed therein are of a personal, as opposed to a public, nature. *See* Respondent's Answer Brief at pp. 32-33; Appendix A to Petition for Writ of Certiorari at p. 10a, n. 3. For example, Petitioner begins chapter 7 of her book with a section entitled "Feminism in the Academy: My Own Case." [R1-14-200]. In this section Petitioner states:

> I begin with a few modest personal examples. The first is an account of how the feminists on my own campus reacted to my criticism of professional feminism. The stories are, of course, only evidentially anecdotal; nonetheless they tell of what I have confronted in the "scholarly" community both within and outside my particular institution.

[R1-14-200]. Similarly, Petitioner, in the final paragraphs of this chapter opines:

> In conclusion, my own experiences with feminists in academe has not been particularly fulfilling . As a woman I liken their sisterhood to a bad sorority — one has to look and think as they do to be accepted. As a philosopher, the situation is worse. Where feminists are in power — specific universities or editorial boards — my work and accomplishments have been ignored.

[R1-14-223, 224]. Such rhetoric stands in stark contrast to the speech at issue in *Maples v. Martin*, where the Eleventh Circuit determined that professors' submission of responses (which contained criticism about the way their department was being run) to a faculty survey designed to improve Auburn University's mechanical engineering department, contained matters of public concern. 858 F.2d at 1553.

Petitioner next asserts that the district court's finding that the posting of the State of Florida's notice with respect to the "Germany Today" course on her door is contrary to the Fifth Circuit's decision in *Kaprelian v. Texas Woman's University*, 509 F.2d 133 (5th Cir. 1975). Once again, however, Petitioner distorts the Fifth Circuit's holding in that case to suit her own needs. The court's decision in *Kaprelian* merely held that the First Amendment would be violated if a public educational institution, or official thereof, refused to permit an instructor to "voice and apply in his teaching academic views relevant to assignments actually given him. . . ." 509 F.2d at 138. In the present circumstance, Petitioner does not contend that Respondents constrained her ability to voice her academic views with respect to the courses she taught. As Petitioner did not teach the

"Germany Today" course, the Fifth Circuit's holding in *Krapelian* is wholly inapplicable. Indeed, Petitioner's claim about the "Germany Today" course has nothing to do with either the courses she taught or whether the "Germany Today" course would be taught; it merely concerns whether the "Germany Today" course would be listed in a University course catalog as a philosophy course.

In marked contrast to the facts in *Kaprelian*, Petitioner — an opponent of the view that the "Germany Today" course should receive a PHI prefix — placarded her door with copies of the State of Florida's determination that the course should more appropriately be categorized as a history or philosophy course. In so doing, Petitioner wrote the following derogatory message to her Department Chair on the State's determination: "D — wake up and smell the roses — this dept. needs me and Fenner. We do *real* philosophy." [R4-64-E-Tab 6]. As the district court correctly observed below, Petitioner's speech in this regard was clearly that of an employee concerned about a matter related to the administration of the University, as opposed to the speech of a citizen about a matter of public concern. *See* Appendix A to Petition for Writ of Certiorari at p. 9a. In so doing, the district court below noted that the circumstances in Petitioner's case were quite analogous to the Eleventh Circuit's recent decision in *Williams v. Alabama State University*, 979 F. Supp. 1406, 1410 (M.D. Ala. 1997), wherein the Eleventh Circuit determined that a professor's speech about the content of a textbook related to his employment and therefore was not a matter of public concern. *See* Appendix A to Petition for Writ of Certiorari at p. 9a.

Finally, Petitioner asserts that the district court's failure to find that she "whistleblew on members of the Department who made racist comments . . ." about Fenner is contrary to the opinions of the Tenth Circuit in *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988) and *Gardetto v. Mason*, 100 F.3d 803 (10th Cir. 1996). Once again, however, such an assertion is incorrect. Respondents acknowledge that Petitioner's citation to the Tenth Circuit's opinions in *Gardetto* and *Conaway* is correct to the extent those cases stand for the proposition that "[s]peech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interest." *Conaway*, 853 F.2d at 796;

and *Gardetto,* 100 F.3d at 813. However, notwithstanding Petitioner's conclusory assertions to the contrary, the record evidence reveals that no such racist comments were at issue in this case.

Moreover, Petitioner's reliance on the *Conaway* and *Gardetto* cases is misplaced. In both of those cases, the courts stated that:

> In deciding how to classify particular speech, courts must focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.

Id. The record in this case clearly demonstrates that Petitioner's support of Fenner as a candidate for an Assistant Professor position at the University was motivated out of personal interest, as opposed to a public concern.

Furthermore, while *Gardetto* may at first appear factually similar to the present circumstances — as one of the issues in that case concerned an employee's support of three minority candidates for a board of trustees position — a close reading of that case clearly reveals that it is distinguishable. Specifically, the Tenth Circuit in *Gardetto* concluded that an employee's speech in support of three minority board of trustee candidates rose to the level of a public concern because of the unique nature of the function of the board of trustees which determined the nature and extent of educational services available to the public. 100 F.3d at 813. In rendering this determination, the Tenth Circuit expressly noted that the board of trustees "is not a committee charged merely with the administration of internal affairs." *Id.* In marked contrast to the circumstances in *Gardetto*, however, the Petitioner's speech concerning Fenner's candidacy as an Assistant Professor was related to her involvement on the Philosophy Search Committee — i.e., "a committee charged merely with the administration of internal affairs." *Id.* Accordingly, despite any apparent similarities to the contrary, Petitioner's speech did not address matters of public concern, but rather issues related to the administration of the University.

IV. THE UNITED STATES DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS

In her final argument in support of why her Petition for Writ of Certiorari should be granted, Petitioner asserts that the opinions of the Eleventh Circuit concerning qualified immunity of government officials in cases involving First Amendment rights of free speech conflict with those of the United States Courts of Appeals for the Fourth and Tenth Circuits. Additionally, Petitioner argues that the defense of qualified immunity is unavailable to Respondents with respect to her claims for prospective equitable relief against them in their official capacities. *See* Petitioner's Writ of Certiorari at pp. 8-9. Respondents address each of Petitioner's claims in turn.

The district court's award of summary judgment was principally predicated on its finding that Petitioner's speech did not constitute a matter of public concern, not upon the doctrine of qualified immunity. Indeed, the district court only briefly addressed the issue of qualified immunity in a footnote, stating:

> Further, the Court agrees with Defendants Courtwright and Schafer that — had the case not been dismissed — they would have been protected in their individual capacities from claims brought under 42 U.S.C. Section 1983 by the doctrine of qualified immunity because "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Gold v. City of Miami,* 121 F.3d 1442, 1445 (11th Cir. 1997).

See Appendix A to Petition for Writ of Certiorari at p. 12a, n.18.

However, even assuming that the district court principally relied on the doctrine of qualified immunity in rendering its decision in favor of Respondents, such a ruling was not improper. As this Court has noted,

> [q]ualified immunity shields government officials from suit unless their conduct violates a clearly established constitutional or statutory right of which a reasonable person would have been aware.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In order to defeat the defense of qualified immunity, Petitioner bears the burden of demonstrating that the law was clearly established at the time the alleged violations occurred. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *see also McDaniel v. Woodard*, 886 F.2d 311, 315 (11th Cir. 1989). Moreover, whether the applicable law was clearly established at the time of the alleged violation is determined by reference to decisions of either this Court or the Eleventh Circuit. *See D'Auganno v. Gallagher*, 50 F.3d 877, 881, n.6 (11th Cir. 1995). Simply stated, decisions of other jurisdictions have no bearing on a qualified immunity analysis.

In the absence of any Eleventh Circuit or Supreme Court jurisprudence demonstrating that a reasonable official in Respondents' positions would have realized that his actions were violative of Petitioner's clearly established rights, Respondents are entitled to qualified immunity from suit. In the present case, Petitioner has notably failed to bring such controlling case law to the Court's attention.

In her brief, Petitioner also argues that the defense of qualified immunity is moot with respect to her official capacity claims against Respondents for prospective equitable relief. *See* Petition for Writ of Certiorari at p. 8. Although Respondents are not quite certain what Petitioner means when she asserts that such a defense is "moot," they nevertheless contend that her ability to make such an argument is now moot, as she did not raise it in her initial appellate brief, but instead first raised this argument in her reply brief.[4] *See* Petitioner's reply brief at p. 24. According to Eleventh Circuit Rule 28(c), the appellant may only file a reply brief in response to the appellee's answer brief. *See* 11th Cir. R. 28(c). Since Petitioner did not raise this issue in her initial brief before the Eleventh Circuit, and since

4. Respondents note that in her reply brief, Petitioner stated that she is now only interested in injunctive relief, and that as a result, this fact moots the Respondents' defense of qualified immunity. *See* Petitioner's reply brief at p. 24. Such an assertion is incorrect. The defense of qualified immunity only applies to individual capacity actions, not official capacity claims. Since Petitioner still seeks to prosecute individual capacity claims against Respondents, they fail to see how this defense has been mooted.

Respondents did not raise this issue in their answer brief, Petitioner waived her right to raise this issue. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (absent unusual circumstances, the United States Supreme Court does not decide questions not properly raised or resolved in the lower courts).

CONCLUSION

Rule 10 of this Court establishes that certiorari review is not a matter of right, but of judicial discretion. This Rule further states that certiorari review will only be granted for "compelling reasons." Petitioner has established no compelling reason warranting this Court's certiorari review of her case. Wherefore, for the foregoing reasons, Respondents request that Petitioner's Petition for Writ of Certiorari be denied. Respondents further request that this Court award them double their reasonable costs associated with the filing of this brief in opposition, in accordance with Rule 42.2 of the Rules of the United States Supreme Court.

Respectfully submitted,

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